

**LAND POLICY CHALLENGES IN INDONESIA:  
FINAL PROJECT REPORT OF THE LAND LAW INITIATIVE**

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**LAND LAW INITIATIVE**

Submitted by:  
Rural Development Institute, Grantee

Prepared by:  
Robert Mitchell  
Roy Prosterman  
Akhmad Safik

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## EXECUTIVE SUMMARY

Indonesia's legal and regulatory framework governing land is flawed and in need of a comprehensive overhaul. The legal framework fails to provide a conducive environment for investment and economic growth, and fails to open doors of opportunity for the poor, women and indigenous communities. Development of sound policies and laws acceptable to citizens, and also acceptable to the bureaucracies that must implement them, will require a great deal of dialogue among the various stakeholders. In the current era of decentralization of Government functions, the design and implementation of sound land policies poses unique challenges, which Indonesian planners are only beginning to address.

It is within this context that the Rural Development Institute (RDI) has implemented the Land Law Initiative. In collaboration with the National Land Agency (BPN) and the University of Indonesia Graduate Faculty of Law (UI), the project set out accomplish two primary objectives: (i) to develop drafts for five foundational land-related laws through a well-informed and participatory process; and (ii) to strengthen BPN capacity to draft laws and regulations that are technically sound, participatory and informed, and that benefit from comparative experience.

Preparation of the new draft laws and regulations was complicated both by institutional issues at BPN, and by the fact that RDI has disagreed with a number of policies that BPN drafters sought to advance in various draft law and regulations. We therefore measure project success with regard to the preparation of legislative drafts in two ways: (1) incorporation of sound land policies in legislative drafts, and (2) reconsideration and delay in the adoption of legislative drafts that incorporate unsound land policies. The following briefly summarizes results on the five legislation initiatives:

### ***Land redistribution***

RDI worked closely with BPN drafters to develop an entirely new Government regulation "On Land Distribution and Payment of Compensation" to replace a long outdated regulation from 1961. The draft has successfully advanced through inter-ministerial meetings and now awaits the signature of the new president. Once it becomes law, the new regulation will facilitate resolution of longstanding conflicts over access to agricultural land, and will allow local governments to allocate household plots to poor families, thus relieving pressures caused by landlessness in Indonesia. This regulation promises to be a positive breakthrough in land policy.

**Next steps:** Once the regulation is adopted, BPN officials responsible for implementing the regulation are interested in conducting small pilots in several *kabupatens* where leaders are well disposed towards resolving land conflict issues and providing landless and land poor farmers with access to land. We have recommended that at least one site should involve creation of small *pekarangan* (homegarden plots) for distribution to poor rural families. BPN and the implementing civil society groups would benefit from technical assistance in

drafting the presidential decree, designing the pilot program, and implementing the program.

### ***Land registration***

RDI worked closely with BPN drafters to develop a Government regulation to replace the current regulation governing land registration. Although drafters included key provisions to streamline the process for mapping parcels and registering land rights, RDI ultimately recommended that BPN not present the draft to the Government. That recommendation is based on the presence of provisions tending to make registration more difficult and more expensive for ordinary land owners. Specific barriers include the use of unnecessarily precise mapping techniques and the practice of requiring land owners to purchase unnecessary certifications as a pre-requisite to initial registration.

**Next steps:** Meaningful progress in this area will likely require leadership from the highest levels of Government to coordinate and direct the efforts of BPN and the Ministry of Finance. Review must include fiscal policies that tax the initial registration of land, as well as national budget policies that fail to appropriate sufficient funds for systematic aerial mapping of parcels. BPN officials have the skills to prepare the necessary laws and regulations, but lack direction and adequate funding to accomplish this task.

### ***Eminent domain***

RDI supported efforts of civil society groups that opposed the BPN draft law on eminent domain, which would greatly expand the Government's power to use compulsory processes to acquire private land for commercial, non-public purposes. RDI sponsored collaboration between a team of BPN drafters and civil society groups to develop a more appropriate draft law that would limit the eminent domain power to public purposes, while providing a more transparent process to protect the interests of land owners and land users who relinquish their land rights. These drafts remain in competing forms, and no draft has been submitted to the Government.

**Next steps:** The Government should support the alternative draft being developed through collaboration between a group of civil society groups and BPN officials. This draft correctly focuses on limiting the eminent domain power to public purposes and would make the process for acquiring private land more transparent and participatory.

### ***Land rights***

RDI attempted, without success, to persuade BPN drafters to prepare a more progressive draft Law on Land Rights to protect the interests of ordinary Indonesian land owners. BPN drafters ultimately developed a draft that threatens to undermine existing customary rights of many millions of Indonesian families and make the process to formalize land rights much more expensive in the future. RDI circulated materials explaining the defects of the draft within and outside BPN. BPN submitted the draft law to the Government, and the Government returned the draft to BPN for further work.

**Next steps:** Preparation of a progressive, forward looking law will require leadership from the Government, and a commitment to delve into the procedures and processes that currently threaten citizens with loss of their land rights. The new law should be designed to strengthen the sense of private land ownership and reduce current barriers to claiming secure ownership rights. It will be important for civil society groups and academics to remain engaged in the process.

### ***Basic Agrarian Law***

RDI attempted, unsuccessfully, to persuade BPN to prepare a draft law that sustains and advances the spirit of the existing Basic Agrarian Law No. 5 of 1960. BPN drafters prepared a draft that departs significantly from the current law, and encountered vigorous opposition and protest from a number of civil society groups. RDI's principal concern is that the draft would undermine existing customary rights of Indonesian families (including rights to agricultural and residential land) and would needlessly concentrate power in the hands of land administrators. BPN submitted this draft law to the Government, and the Government returned the draft to BPN for further work.

**Next steps:** Although the this law has tremendous symbolic value among influential civil society groups, the law could be strengthened to provide more concrete protections for the land rights of citizens. Civil society groups determined to preserve the populist sentiments expressed in the law will likely resist attempts to change the law other than to restore the law's authority over forest and mining areas, adjustments that are sure to be resisted by the Ministry of Forestry and the Ministry of Energy and Mineral Resources. Unless this stalemate can be resolved, it is unlikely that the law will be improved to clarify land owner protections.

### ***Need for technical assistance***

Technical assistance to BPN and other Government and civil society stakeholders is needed both to promote sound policies and laws, and to discourage pursuit of unsound policies. In many cases the bureaucracies responsible for resolving land problems end up contributing to or exacerbating problems. Some issues require a fresh approach and a thorough reworking of solutions. BPN is likely to require additional assistance in coming years, especially if the new Government prioritizes land relations in its promotion of economic development and assault on poverty. Technical assistance would also benefit other agencies and ministries, including the Office of the Cabinet Secretary, the Coordinating Ministry for Economic Affairs, Bappenas, the Ministry of Home Affairs, the Ministry of Agriculture, the Ministry of Finance and the People's Representative Assembly (DPR), as well as the Coordinating Team for Land Affairs currently charged with developing national land policy. Similar, but separate, technical assistance would benefit the staff of civil society groups that focus on agrarian and natural resource issues.

*The Government of Indonesia* must take a greater interest in the impact that current land policies and laws have on citizens and investors, with particular attention to the impact these have on the poorest families. The Government must establish goals and priorities for BPN, and it must allocate sufficient budget resources to accomplish goals. The Government must also coordinate policies of the Ministry of Finance to ensure that these are consistent with land policy goals. Although a step in this direction has been the

creation of the Coordinating Team for Land Affairs, which includes representatives of BPN, the Coordinating Ministry for Economic Affairs, Bappenas and the Ministry of Home Affairs, that team requires technical assistance.

*BPN* should continue to play a major role in developing the national framework of policies and laws that protect the rights of citizens. Although BPN employs many officials who possess the necessary skills and experience to design sound land policies and laws, the organization is not oriented in any coherent or predictable way towards developing policies and laws that help citizens or promote socially responsible development. Once the Government of Indonesia decides that a progressive legal and regulatory framework for land relations is a priority, many BPN officials will be in a position to respond and to help develop appropriate policies and laws. Parallel assistance should be offered to Bappenas, the Ministry of Home Affairs and the Ministry of Finance, each of which have a role to play in the development of land various land and fiscal policies to promote economic development and alleviate poverty.

*Kabupatens* will play an especially important role with respect to resolution of land conflicts and alleviation of landlessness and land poverty. With the Government's anticipated adoption of the regulation "On Land Distribution and Payment of Compensation," the *kabupatens* will acquire a potent new tool for addressing land conflict issues and alleviating landlessness through distribution of land. BPN has already begun considering which *kabupatens* might be appropriate places to launch pilot projects to test the procedures contained in the regulation.

*Civil society groups* can play a critical role in the development of sound land policy and law, implementation of various land policies, and monitoring of land officials in the performance of their duties. Such groups have traditionally provided a political counterweight to the bureaucracy in matters of public policy development, adoption of laws and implementation. To be more effective in the arena of land policy development, representatives of civil society groups would benefit from training and information regarding what are too often considered to be technical aspects of regulating and administering land relations. It is often the "technical" components of such regulation that compromise land rights and impose obstacles to land access by the poor. Such groups will be more effective watchdogs if they understand the ways in which bureaucrats take advantage of gaps and ambiguities in regulations and laws to exercise discretion. Civil society groups would also benefit from training regarding the benefits of private rights to land and functioning land markets. There is a moderate degree of distrust among Indonesian civil society groups for private land rights and land markets.

## **LAND POLICY CHALLENGES IN INDONESIA: FINAL PROJECT REPORT OF THE LAND LAW INITIATIVE**

The design and implementation of progressive land policies and laws in Indonesia—policies that would create a conducive environment for investment and economic growth, and open doors of opportunity for the poor, women and indigenous communities—is likely to remain a challenge for some years to come. Although the National Land Agency, which is charged with preparing land policies and laws for non-forested areas, employs many officials who possess the necessary skills and experience to accomplish this, the organization is not sufficiently oriented towards developing policies that help citizens or promote socially responsible development. Once the Government of Indonesia decides that forward-thinking land policies and laws are a priority, many National Land Agency officials will be in a position to respond and to help develop appropriate policies.

It is within this context that the Rural Development Institute (RDI) has implemented the Land Law Initiative during the three-year grant period ending July 31, 2004. Section I of this report presents a summary of project objectives and accomplishments, and describes the context in which the project was designed and implemented. Section II describes in greater detail the legislative drafts produced during the grant period. Section III describes the training and research components of the project, and Section IV concludes with recommendations for helping Indonesian policymakers to move forward in improving the legal and regulatory framework for land relations.

### **I. OBJECTIVES, ACCOMPLISHMENTS AND CONTEXT**

#### **Land relations and the role of law**

In his inaugural speech delivered on October 20, 2004, the new President of Indonesia, Susilo Bambang Yudhoyono, observed that 16 percent of Indonesians still live below the poverty line, and that the greatest challenge of the nation is “to free our people from poverty, ignorance, backwardness, and all problems that prevent the growth of people’s abilities.”<sup>1</sup>

Law is a critical tool for making the institutional changes needed to support Indonesia’s economic development and alleviate poverty. Many development challenges in Indonesia are in some way related to land. These challenges fall into five broad and interrelated categories, each of which stems in large part from the grossly inadequate legal and regulatory framework governing land relations:

- a. Land markets. Efficient and equitable land markets facilitate modern economic development because they quickly and flexibly accommodate changes in land use, allow fair and low-cost land transactions, and mobilize financial resources through collateral arrangements. Indonesia lacks efficient and equitable land markets and a well-functioning land

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<sup>1</sup> Jakarta Post, “Now is the time for action: Susilo” (transcript of inaugural address), October 20, 2004.



registration system necessary to create such markets, which impairs economic growth, obstructs investment and impedes access to credit markets.

b. Rural poverty. Land access issues are at the center of rural poverty problems in Indonesia. Like many developing countries, rural poverty is closely linked with landlessness. The 50 percent of Indonesia's population that remains dependent on agriculture includes as many as 11 million landless households and many millions of additional households with ill-defined rights on customary lands.

c. Social conflicts. Numerous social conflicts, unrest, and human rights violations can be traced to land problems. Because most land rights are ill-defined and the State has wielded excessive power, the State over the years has trampled on the land rights of many Indonesian citizens during acquisition of land for public and private development purposes.

d. Natural resource management. Experience throughout the world shows that secure land tenure significantly contributes to sustainable management of agricultural and forest land. Farmers and forest dwellers who lack secure land tenure are apt to mine soils and forests, whereas those with secure land tenure have the incentive to make long-term investments to preserve and improve the natural resource base. Inadequate land administration capability compounds environmental problems.

e. Gender inequality. Women in Indonesia have unequal access to and control over land, even though women are increasingly involved in family income-generating activities. Although some formal legal protections exist, these are inadequate and frequently eroded in practice.

Indonesia's land legislation is flawed and in need of a comprehensive overhaul. The legal framework fails to provide a conducive environment for investment and economic growth, and fails to open doors of opportunity for the poor, women and indigenous communities.

Most law drafters in Indonesia have lacked training to draft laws that are well-designed and that can be implemented effectively. This lack of training has led to several shortcomings that typically doom the law drafting process. Law drafters have often worked without understanding the problems, issues and needs the law is intended to address. Drafters have not systematically gathered and analyzed input from either the people and legal entities whose rights and opportunities would be impacted by the law, or the institutions that would implement and enforce the law. Moreover, law drafters have not been well trained in drafting techniques and practices that can make the legal architecture and sentence structure clear and understandable to groups expected to use the law. In addition, Indonesian law drafters have rarely had access to a broad range of comparative legislative models and approaches, which can provide valuable lessons for tailoring laws to fit a particular context.

## **Project objectives**

The overriding purpose of the Land Law Initiative has been to improve land law in Indonesia to create a conducive environment for investment and economic growth, and to open doors of opportunity for the poor, women and indigenous communities. RDI has collaborated with the National Land Agency (BPN) and the University of Indonesia Graduate Faculty of Law (UI) to accomplish two primary objectives:

- (i) Develop drafts for five foundational land-related laws through a well-informed and participatory process; and
- (ii) Strengthen BPN capacity to draft laws and regulations that are technically sound, participatory, informed, and that benefit from comparative experience, and strengthen UI capacity to provide similar training to other government officials.

Although RDI accomplished the training component without difficulty, the task of persuading BPN to draft progressive land legislation and embrace participation from other stakeholders proved more challenging. Drafting of the five laws and regulations proceeded more slowly than anticipated, due in part to political and institutional concerns unrelated to the laws being drafted. Moreover, RDI was (and remains) opposed to fundamental policy principles that BPN drafters inserted into several drafts, which has prompted RDI to recommend reconsideration of those drafts, as explained more fully below.

## **Summary of project accomplishments**

RDI's work with respect to the second objective, training in sound legislative drafting processes and techniques, was an unqualified success. RDI provided training and guidance to several dozen BPN drafters, helping them to improve greatly their ability to prepare effective legislative materials. The success of this work is reflected in the technical quality of the drafts produced by the two most active BPN drafting teams.

RDI's work with respect to the first objective, preparation of the new draft laws and regulations, was complicated both by institutional issues at BPN, and by the fact that RDI has disagreed with a number of policies that BPN drafters sought to advance in various draft law and regulations. BPN is organized into separate departments that operate more or less independently, including in the preparation of initial drafts of legislative materials. We found that some departments are much more willing to embrace reforms, while other departments prefer to consolidate power. We therefore measure project success with regard to the first objective in two ways: (1) incorporation of sound land policies in legislative drafts, and (2) reconsideration and delay in the adoption of legislative drafts that incorporate unsound land policies.

The following briefly summarizes results on the five land legislation initiatives (each of which is described in more detail later in the report):

- (a) Land redistribution. RDI worked closely with BPN drafters to develop an entirely new Government regulation "On Land Distribution and Payment of

Compensation” to replace Government Regulation No. 224 of 1961 “On Implementation of Redistribution of Land and Provision of Compensation.” The draft regulation has successfully advanced through interministerial meetings under the guidance of the Cabinet Secretary’s office and now awaits the signature of the new president. Once it becomes law, the new regulation will facilitate resolution of longstanding conflicts over access to agricultural land, and will allow local governments to allocate household plots to poor families, thus relieving pressures caused by landlessness in Indonesia. This regulation promises to be a positive breakthrough in land policy.

(b) Land registration. RDI worked closely with BPN drafters to develop a Government regulation to replace Government Regulation No. 24 of 1997 “On Land Registration.” Drafters included a number of key provisions to streamline the process for mapping parcels and registering land rights. However, during the final months of the project, RDI ultimately recommended that BPN not present the draft regulation to the Government. RDI’s recommendation is based on the presence of a number of provisions tending to make registration more difficult and more expensive for ordinary land owners.

(c) Eminent domain. RDI supported the efforts of civil society groups that opposed the BPN draft law on eminent domain, which would greatly expand the Government’s power to use compulsory processes to acquire private land for commercial, non-public purposes. In addition to criticizing the draft, RDI sponsored collaboration between a team of BPN drafters and civil society groups to develop a more appropriate draft law that would limit the eminent domain power to public purposes, while providing a more transparent process to protect the interests of land owners and land users who relinquish their land rights. These drafts remain in competing forms, and no draft has been submitted to the Government.

(d) Land rights. RDI attempted, without success, to persuade BPN drafters to prepare a more progressive draft Law on Land Rights to protect the interests of ordinary Indonesian land owners. BPN drafters ultimately developed a draft that threatens to undermine existing customary rights of many millions of Indonesian families and make the process to formalize land rights much more expensive in the future. RDI prepared materials explaining the defects of the draft and circulated the materials within and outside BPN. BPN submitted the draft law to the Government, and the Government returned the draft to BPN for further work, where it now remains.

(e) Basic Agrarian Law. RDI attempted, unsuccessfully, to persuade BPN to prepare a draft law that sustains and advances the spirit of the existing Basic Agrarian Law No. 5 of 1960. BPN prepared a draft that departs significantly from the current law, and encountered vigorous opposition and protest from a number of civil society groups. RDI’s principal concern is that the draft would undermine existing customary rights of Indonesian families (including rights to agricultural and residential land) and would needlessly concentrate

power in the hands of land administrators. BPN submitted this draft law to the Government, and the Government returned the draft to BPN for further work, where it now remains.

## **Genesis of project**

RDI has maintained a longstanding interest in Indonesian land law and land administration policy, dating from the 1970's when RDI's founder, Professor Roy Prosterman, traveled to Indonesia to investigate economic prospects of Indonesian farmers. Prosterman returned to Indonesia periodically over the years, and in the mid-1980's agreed to serve as an advisor for the doctoral dissertation work of Erman Rajagukguk, then a candidate for a PhD in Law at the University of Washington School of Law in Seattle.<sup>2</sup> Dr. Rajagukguk subsequently returned to Jakarta and became a Professor of Law at the University of Indonesia.

At Professor Rajagukguk's invitation, RDI traveled to Indonesia several times during the early 1990's to conduct fieldwork and to meet with Indonesian civil society groups interested in agrarian issues. RDI and its Indonesian counterparts developed and submitted to USAID several grant proposals focused on studying and addressing problems of rural landlessness. In 1996 USAID hired a team of experts, including RDI attorneys and Professor Rajagukguk, to conduct fieldwork and other study of land relations and land conflict in Indonesia.<sup>3</sup>

In August 1998 RDI was introduced to Dr. Lutfi Nasution, the recently appointed Vice-Chairman of BPN, and was invited to work with BPN on a series of land laws and regulations. This was the period immediately following the resignation of President Suharto, and there appeared to be a great deal of Government enthusiasm for reform initiatives. Professor Rajagukguk had been appointed as Deputy Minister of Justice during the waning months of the Suharto regime, and then appointed as Vice-Secretary of the Cabinet by the administration of B.J. Habibie, a position he retained under the administrations of Abdurrahman Wahid and Megawati Sukarnoputri, and continues to hold under President Yudhoyono.

At Dr. Nasution's invitation, RDI used its own funds to travel to Indonesia in August 2000 to meet with BPN legislative drafters. RDI worked with BPN on a draft law to replace the Basic Agrarian Law No. 5 of 1960, commented on draft revisions of a regulation on land registration, and discussed a new draft regulation on land redistribution. BPN expressed interest in collaborating on a larger legal drafting project. In September 2000, RDI joined

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<sup>2</sup> Professor Rajagukguk's 1988 dissertation focused on the difficulty which Indonesian farmers and other villagers had in obtaining access to land in rural Java, and proposed a modest program for allocating small amounts of Government land to help rural citizens meet subsistence needs. E. Rajagukguk, "Agrarian Law, Land Tenure and Subsistence in Java: Case Study of the Villages of Sukoharjo and Medayu" (1988), PhD Dissertation, University of Washington School of Law, Seattle.

<sup>3</sup> See W. Thiesenhusen, T. Hanstad, R. Mitchell and E. Rajagukguk, "Land Tenure Issues in Indonesia" (March 1997), prepared for USAID/Jakarta under Indefinite Quantity Contract LAG-4200-I-00-3059-00, on file with the Rural Development Institute, Seattle.

with Dr. Nasution and Professor Rajagukguk to propose the Land Law Initiative under the Partnership for Economic Growth grant program.

USAID awarded the three-year grant in June 2001 and RDI began work in Jakarta in July. Under the grant cost-sharing agreement, RDI and its partners agreed to contribute 35 percent of project costs and USAID agreed to fund the balance.

### **Legislative drafting priorities and orientation**

RDI established an office in Jakarta using space provided by the UI Graduate Law Faculty and resumed meeting with BPN officials in July 2001, working on revisions to the Basic Agrarian Law and the draft Law on Land Rights. Events within the Government and BPN itself greatly influenced the activities of BPN staff. In July 2001 the Indonesian Parliament removed President Wahid and installed President Sukarnoputri. In August the BPN leadership thoroughly reorganized senior personnel, reassigning all senior staff to new posts within the agency. In September, earlier rumors that BPN's status within the Government would change were confirmed when the Government separated BPN from the Ministry of Home Affairs and ordered BPN to begin reporting directly to the president. Dr. Nasution continued running day to day operations at BPN, but it was not clear he would be appointed to head the agency. His appointment as BPN Chairman was delayed until early December 2001.

An ongoing source of uncertainty for BPN staff during this time (and which continues today) is the impact of Law No. 22 of May 7, 1999 "On Regional Administration," which provides, without elaboration, that regional governments will assume authority to administer "land matters." The law provided that the decentralization must be implemented within two years. In January 2001 President Wahid further postponed the deadline for decentralization in Presidential Decree No. 62 of May 17, 2001, providing that BPN must prepare the necessary laws and regulations within two years. This established a May 2003 deadline for decentralizing BPN's functions.

During November 2001, the People's Consultative Assembly (MPR) adopted MPR Provision No. IX, which directed the Government to develop a strategy for addressing various land administration problems in the country, including land reform to correct the imbalance in access to land and introduction of processes to resolve conflicts over access to land. President Megawati Sukarnoputri's administration did not order BPN to institute any specific reforms in land administration activities as contemplated by MPR Provision No. IX. Nor did BPN receive concrete guidance from either the administration or the MPR regarding decentralization of its duties. BPN was left to propose a plan for its own dismemberment and to draft regulations to accomplish it—tasks that BPN was understandably reluctant to perform.

The combination of these factors—internal changes at BPN, uncertainty regarding who would lead BPN, uncertainty about the organization's status within the Government, and the absence of any clear direction from the Government—led to what amounted to a suspension of BPN's legislative drafting agenda during the second half of 2001. At that time BPN stopped working on revisions to the Basic Agrarian Law No. 5 of 1960 and other legislative drafts.

RDI responded to this shift in BPN priorities by increasing focus on two areas in which BPN drafters remained engaged—land redistribution and land registration. In the spring of 2002 RDI began working closely with the small staff of BPN officials responsible for implementing the badly outdated 1961 regulation on land redistribution, working to develop a new paradigm for resolving widespread land conflicts and landlessness in the countryside. RDI also began working intensively with a separate large group of BPN drafters tasked with revising the 1997 regulation on land registration. This work continued during 2002 and 2003.

As the May 2003 deadline for decentralizing BPN functions approached, BPN staff became increasingly agitated concerning the future of the agency. This uncertainty was partially addressed by Presidential Decree No. 34 of 2003, signed on the day on which BPN's May 2003 deadline was set to expire. Decree No. 34 identified a number of land administration functions that the agency must devolve to the regional governments, but left centralized a number of BPN functions, including land registration. The decree also set an August 1, 2004 deadline by which BPN must produce draft revisions to the Basic Agrarian Law No. 5 of 1960 and a new draft Law on Land Rights.

During 2003 and 2004, RDI continued to work closely with the land redistribution directorate and the land registration directorate of BPN to develop draft regulations and conduct training in drafting techniques. In the spring of 2004, BPN finally began working on draft legislation to revise the Basic Agrarian Law and create the new Law on Land Rights, both of which the agency had to submit to the Government by August 1, 2004. As RDI became more involved in the development of those drafts, we increasingly found ourselves at odds with drafters of these documents with respect to a number of policy issues.

During the fall of 2003 BPN also resumed work on a draft law on eminent domain. RDI found that it disagreed with the fundamental approach taken in the draft and looked for ways to help steer the draft in a more positive direction. Thus, during the final six months of the grant period, RDI found itself fully engaged on all five legislative drafting assignments, but in varying postures ranging from effective input and agreement to opposition to the drafts that were emerging.

During the three-year grant period, RDI developed close relations with many BPN officials. RDI pledged not to share drafts with others prior to their presentation to the public, and in return received access to working drafts of legislative materials. This working arrangement resulted in RDI playing the role of an “in-house” technical advisor to BPN. Although we had access to materials, we were not able to present extensive reports to civil society groups, which hampered our ability to engage with these groups effectively regarding the land policy that BPN was drafting.

Development of appropriate land policies was made more difficult by the fact that BPN did not hold effective public hearings (“public consultations”) on the various drafts, as required by law. Although BPN did organize public consultations on several drafts under development, invitations were often not extended to either the public or to civil society groups that might be expected to examine the drafts with an eye towards defending the interests of the public. In some cases, public consultations were organized without advance warning and without making the legislative drafts available to invitees in advance

of the meeting. The result was that the consultations often took the form of presentations by BPN staff, followed by a limited question and answer period in which invitees asked general questions based on review of materials received only moments before. Such pro-forma consultations did not foster meaningful analysis of the drafts, although sometimes even the very short initial review by attendees did generate critical comments on the draft that paralleled criticisms we were offering in our advisory role.

The foregoing institutional issues influenced the nature of work under the Land Law Initiative. Although RDI succeeded in making good progress in developing sound legislative drafts and improving drafting capacity, that success was concentrated in several BPN directorates. The project had less success in working with those directorates responsible for allocating state land to corporations and directorates that convert customary land rights into registerable land rights. Although the staff of these directorates is competent, these directorates are not currently oriented towards making land policies and laws that protect the rights of ordinary citizens or promoting economic and social development.

## **II. LAND LAW DRAFTING**

The following pages describe in greater detail development of the five legislative drafting topics.

### **Drafting topic 1: land redistribution**

Competition over access to land is a source of conflict in many Indonesian communities. Conflict over control of cropland (and former cropland) often relates to land that the Government seized from individuals and communities during the Suharto regime and allocated to corporations to establish plantations. Thus, the desire of farmers for greater access to land is often accompanied by community resentment regarding past Government programs to create plantations.

#### *Landlessness on Java*

Access to adequate amounts of agricultural land has long been a problem for Indonesian farmers and agricultural laborers. The proportion of landless and land-poor agricultural households is especially high on Java. According to 1993 data gathered by the Indonesian National Statistics Bureau (BPS), of the approximately 17.3 million families on Java characterized as farmer or agricultural laborer households, roughly 39 percent (6.7 million families) neither lease in nor own any cropland, and another 44 percent (7.6 million families) lease in or own less than 0.5 hectares.<sup>4</sup> Thus, fully 83 percent of agricultural families either work as laborers or cultivate less than 0.5 hectares of land.

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<sup>4</sup> Land Holding Farmers Sample Census (National Statistics Bureau [BPS], 1993 Agricultural Census), Table 1; 1993 Census Report on Household Registration in the Sub-Sectors of Paddy, Secondary Crops and Horticulture (National Statistic Bureau [BPS], 1993 Agricultural Census), Table E. There is no separate data collected regarding land ownership since records of agricultural land ownership are not publicly disclosed at the local level.

In the early 1960's, Indonesia attempted to remedy the disparity in access to land by redistributing holdings that exceeded ownership ceilings ("excess land") or land held by owners who lived outside the district where the land was located ("absentee land"). The program sought to provide each farming family with up to 2 hectares of land. The program redistributed only seven percent of the agricultural land and reached only six percent of eligible farmers. In the mid-1960's the Government abandoned the program in the wake of a 1965 Communist-led coup attempt followed by broad violence directed against citizens believed to be associated with the Indonesian Communist Party.

The Government's program to distribute full-sized farms to farmers and agricultural laborers made little sense in the 1960's and makes even less sense today, especially on the more densely populated island of Java, where the majority of land poor farming households reside. Even if the Government could afford to purchase enough farmland on Java to distribute full-sized farms to every agricultural family (a very expensive proposition), there is simply not enough agricultural land on Java to provide such farms to a significant fraction of eligible families.

#### *Distribution of homegarden plots*

One alternative to providing full-sized farms to rural families is to provide families with modest-sized "homegarden" plots ("*pekarangan*") where they can produce fruits, vegetables, poultry and fish that they can either consume to supplement the family diet or sell locally to supplement family income. In many settings throughout the world, including on Java, such homegarden plots have been found to contribute significantly to the family diet and family budget.<sup>5</sup>

In June 2004 RDI conducted field research to examine the intensive use of homestead plots in Central Java.<sup>6</sup> We found that sale of animals and plants produced on homestead plots with unbuilt areas even as small as 25 square meters can provide substantial supplement to household incomes, even where the household members earn their primary income from sources other than agriculture. In the examined sample, sale of production from homestead plots increased the cash income of families by an average of 25 percent and a maximum of 67 percent. This contribution to household income would be even higher if the economic value of foods produced on the homegarden plot and consumed by the households were considered.

Ownership of existing *pekarangan* plots in Indonesia is also skewed. For Indonesia as a whole, of families who own *pekarangan*, 77 percent own less than 300 square meters, 66 percent own less than 200 square meters, and 40 percent own less than 100 square meters.<sup>7</sup> A program to convert modest amounts of dryland ("*tegalan*") to *pekarangan* for

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<sup>5</sup> See R. Mitchell and T. Hanstad, *Small Homegarden Plots and Sustainable Livelihoods for the Poor* (UN Food and Agriculture Livelihood Support Programme 2004), available at [www.fao.org/sd/dim\\_pe4/pe4\\_040501a\\_en.htm](http://www.fao.org/sd/dim_pe4/pe4_040501a_en.htm).

<sup>6</sup> The findings of the June 2004 research are presented in Annex 1.

<sup>7</sup> Hadi Susilo Arifin, "Study on the Vegetation Structure of Pekarangan and Its Changes in West Java, Indonesia," doctoral dissertation for the Graduate School of Natural Science and Technology, Okayama University, Japan, March 1998, at Appendix Table 2 (citing 1995 Housing and Settlement Statistics, Indonesian Statistics Center Bureau, 1996). The density of occupation on the



distribution to poor families in rural areas of Java would be an affordable and highly beneficial intervention.

### *Engaging policymakers*

The renewed interest of the Government in the issues of landlessness and land conflict arising from lack of access to land was somewhat heightened as the result of the adoption by the People's Consultative Assembly (MPR) in November 2001 of MPR Provision No. IX "Concerning the Agrarian Renewal and Management of Natural Resources." MPR Provision No. IX establishes national policy on land and directs the Government to undertake various tasks, including a national inventory of land for purposes of "organizing the control, ownership, use and exploitation of land (land reform) that is fair, by giving attention to land ownership for the people."

As part of the process to explore options for addressing land distribution issues, on May 8, 2002 RDI organized a seminar titled "Rethinking Land Reform in Indonesia." The seminar attracted 80 participants from BPN, other Government ministries, USAID, Indonesian universities and a number of civil society groups concerned with agrarian and natural resource issues.<sup>8</sup> RDI asked seminar participants to consider a number of questions that illustrate the types of issues policymakers must consider in designing any program for using land to address poverty (see Box 1). Following the seminar, RDI organized a meeting between BPN officials and representatives of the Indonesian national commission on human rights, Komnas HAM, to discuss land distribution priorities.

**Box 1. Questions regarding distribution of land to address land poverty in Indonesia.**

- Who should receive land in a land distribution program (all farmers, very small farmers, agricultural workers, other poor families)?
- Where should land distribution be conducted (only on Java, both on Java and outside Java)?
- What size plots should families receive (commercial size farms, small *pekarangan* homegarden plots, other size plots)?
- What type of land should the Government distribute (expired or unused HGU plantation rights, land held in excess of land ceilings, land held by "absentee" owners who live outside the district where the land is located, other privately owned land purchased by the Government), and what compensation should the Government pay for

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*pekarangan* has increased over the years, and the unbuilt areas declined, as multiple generations have crowded onto a relatively fixed (and even shrinking) total area of *pekarangan* plots, building several houses on plots previously occupied by a single house.

<sup>8</sup> At the seminar Professor Prosterman presented a paper proposing that BPN and the Government focus on prospects for addressing land access issues through distribution of small *pekarangan* plots to the rural poor on Java, where the large majority of rural poor families reside. A copy of that paper appears in Annex 2. Professor Hadi Susilo Arifin of IPB Bogor discussed his research on the economic and social value of *pekarangan* plots in Indonesia. BPN Deputy Heru Wijono and Noer Fauzi of KPA, an agrarian civil society group, presented more general analyses of problems caused by unequal access to land in Indonesia.

such land (market value, tax value, other compensation)?

- How much money should the Government spend in total to acquire land and administer land distribution (in other words, how many families should benefit and at what cost per family)?
- Should recipient families pay for land they receive?
- Should recipient families be forbidden to transfer the land for some period?
- Who will participate in the village committees (or other structures) that decide which families receive land?
- Which level of government should administer the land distribution program?

### *Developing the draft regulation*

Based on seminar presentations and discussions with BPN officials, RDI and BPN drafters began working to develop an entirely new Government regulation to replace Government Regulation No. 224 of 1961 “On Implementation of Redistribution of Land and Provision of Compensation.” In July and August 2002, following the legislative drafting training in Jakarta, RDI organized a series of drafting workshops in Bogor at which BPN staff could discuss in more detail concepts for developing a new policy on land redistribution and to begin drafting the new regulation on land distribution. RDI continued to work closely with BPN drafters, exchanging written comments on draft regulatory language and concepts, and meeting with BPN drafters for a week in Singapore during March 2003 to grapple with important questions regarding the scope and process of the reform program.

The draft regulation produced by the BPN drafters represents a fresh approach to addressing land redistribution issues and resolution of longstanding disputes over land which the Government has taken from Indonesian communities during the past several decades to create corporate plantations. The new draft represents a fundamental shift in the way in which the Government has traditionally conceived of land redistribution:

First, because the old concept focused on reallocating land among farmers rather than helping poor families to gain access to land, and correspondingly on giving relatively large holdings, while not at all including distribution of smaller holdings for *pekarangan* use;

Second, because the old concept was limited to redistributing narrowly defined categories of privately owned rice paddy rather than State owned plantation land, *tanah bengkok* (State owned land in villages), and land purchased by the State; and

Third, because there is renewed appreciation for the importance of decentralizing much of the implementation of the land redistribution program to the kabupaten and village levels by, for example, giving village communities the responsibility to identify (according to well-defined criteria) which parcels will be redistributed and which families will receive land.

The draft that emerged has received informal support from agrarian civil society groups that have consulted with BPN drafters. In August 2004 BPN submitted the draft regulation “On Land Distribution and Payment of Compensation” to the Government for consideration. The Government conducted a series of interministerial meetings in August and September to solicit input from other ministries. In September the regulation was submitted to the President for signature into law. As a result of the change in administrations following the September presidential election, the draft regulation awaits the signature of the new president.

### *Prognosis*

We expect that President Yudhoyono will sign the draft regulation early in his administration.<sup>9</sup> It will then be necessary to develop a presidential decree to establish a national commission to oversee implementation of the regulation. We envision that the regulation will be implemented on a pilot basis in kabupatens whose leaders are progressive and well disposed towards resolving land conflict issues and providing landless and land poor farmers and other rural citizens with access to land.

RDI has begun discussing with BPN and agrarian civil society groups various possible sites for pilot projects. RDI has recommended that at least one of the first sites selected should involve creation of small *pekarangan* (homegarden plots) for distribution to poor rural families.

It would be very useful for BPN and the implementing civil society groups to have technical assistance in drafting the presidential decree, designing the pilot program, and implementing the program. Costs of the pilot program should be minimized wherever practicable to ensure that the program can be replicated in other regions. It will be necessary for each pilot effort to be independently monitored to measure the costs and benefits. It is particularly important to assess the cost per family benefited since this will determine the cost of implementing the program countrywide.

### **Drafting topic 2: land registration**

Since at least August 2000 BPN has worked to prepare a regulation to replace Government Regulation 24 of 1997 “On Land Registration,” the principal legislative text governing registration of land rights in Indonesia. RDI worked with the BPN drafting group responsible for this work during the life of the project. Although the drafters did include a number of key provisions to streamline registration of land rights, RDI ultimately recommended that BPN not submit the draft to the Government. RDI’s recommendation is based on the inclusion of provisions tending to make registration more difficult and more expensive for ordinary land owners, thus delaying completion of the land registry.

Registration of land rights will remain a critical land administration issue in Indonesia for decades to come. In the past 40 years, BPN and its predecessor agencies registered roughly one third of the country’s privately held land parcels, leaving an estimated 60

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<sup>9</sup> BPN is now planning to hold a public consultation in Riau to present the draft to the public on November 8, 2004. Once the draft regulation is presented to the public, we will provide a copy of the draft to USAID.

million parcels unregistered. In recent years, BPN has registered an average of roughly one million parcels per year. Based on this pace, it will take another 60 years to complete the land registry. The challenge of expediting this process is obvious, and the challenge is somewhat intimidating.

Designed in the 1960's, the Indonesian land registration system focuses on registering individual ownership rights converted from existing rights based on *adat* (customary law) or created by State land grants. The system also registers use rights, including use rights granted by the State to corporations for commercial activity, such as establishment of plantations. The system does not attempt to register communal rights arising under customary law, such as the *ulayat* rights of forest-dwelling communities.<sup>10</sup>

Registration of land rights greatly increases the market value of land, a fact that RDI has independently confirmed in interviews conducted with land owners in remote areas of Java. As the act of registration increases the value of land, formal and informal lenders are likely to become more interested in accepting land as collateral for loans, bringing to life the “dead capital” now locked in the land. The artificially high costs of initial registration retard this process by reducing the number of parcels entering the system. Because most citizens are not interested in selling their land in the near term, they find the costs of registration—which include land survey costs, payments for Government stipulation certificates and unrecorded informal fees—to be prohibitive. Land owners very reasonably refuse to pay the excessive fees currently demanded for registration of land rights.

In addition, creation of a modern registration system would enable the Government to determine who actually owns the land. Currently, ownership records for unregistered lands are kept by village officials, who are not obligated to disclose information to BPN officials. Because land taxes are paid by land users, the tax authority has records of land users, but does not maintain records of land owners. The secrecy surrounding land ownership increases transaction costs for land, thus reducing the efficiency of the land market.<sup>11</sup>

RDI has worked to persuade senior BPN registration officials to streamline the processes for systematic initial registration of land rights and for registering subsequent transfers of land rights. We have focused on three central issues, discussed below: (1) the need for more cost-effective mapping of boundaries; (2) the need to abolish expensive certification processes now required for registration; and (3) the need to introduce accountability in the registration of land transactions.

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<sup>10</sup> In fact, operation of the land registration system is de facto limited to lands designated as “agrarian,” a category that includes agricultural and residential land outside of forests. BPN’s authority does not extend to agricultural and residential lands located in the three-quarters of Indonesia over which the Ministry of Forestry claims jurisdiction.

<sup>11</sup> This secrecy in rural land records also makes it impossible for the national and regional governments to enforce laws that restrict absentee ownership and limit the total amount of agricultural land citizens can own.

### *Cost-effective mapping*

Regional branches of the Indonesian Office of Land Tax (PBB) have parcel boundary maps for no more than a small fraction the parcels in the country, and BPN has no maps for fully two-thirds of those parcels. RDI has recommended that BPN consider creating parcel maps using satellite images or aerial photography in order to reduce costs and improve accuracy.<sup>12</sup> For the satellite and aerial images to produce usable maps, BPN surveyors would then “correct” the images using inexpensive GPS measurements for some portion of the parcels.

Parcel maps would likely improve the Government’s ability to collect land taxes. We suspect that some portion of land is not being taxed now since the existing land tax records do not accurately reflect the area of land owned. Registration maps based on satellite data would not only provide more accurate area measurements for lands now on the tax rolls, but would likely identifying lands altogether missing from the tax rolls. Gains in tax revenues would help to offset the Government’s investment in mapping for initial registration.

If costs of parcel mapping can be reduced, the pace of registration could be increased and greater numbers of Indonesians would benefit sooner from registration of land rights. Adoption of less precise methods for measuring parcels would require a change both in BPN administrative orientation and in regulations governing registration of land rights. It is necessary for BPN to embrace the proposition that it is not necessary to guarantee the exact location of every parcel boundary to within a fraction of a centimeter. The unreasonably high value which BPN currently places on precision of boundary measurement is a good example of “the best being the enemy of the good,” since the pursuit of absolute accuracy for a small fraction of Indonesian parcels leaves the great majority of land owners without any registration at all.

Based on conversations with BPN land survey experts, it is possible to compare the costs of creating registration maps based on corrected satellite imagery, corrected aerial photographs, and ground surveys, as summarized in Table 1.

The data demonstrates the enormous cost savings that might be realized through use of satellite or aerial photography, even after including the cost of GPS corrections. These techniques are especially appropriate for mapping boundaries of rural parcels since the value of the land per square meter is considerably less than in urban areas, and the need for precision in locating boundaries is commensurably less. Although not suitable for all areas, BPN land survey experts have confirmed that much privately owned land in rural Indonesia could be mapped using these less expensive techniques.

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<sup>12</sup> In fact, the project design for the World Bank financed Land Administration Program (LAP), completed in June 2001, called for use of satellite and aerial images, but BPN ended up using more expensive ground surveys.

Table 1. Mapping costs using three methods (BPN estimates)<sup>13</sup>

Method	10 parcels per hectare		20 parcels per hectare	
	Cost per hectare (Rp.)	Cost per parcel (Rp.)	Cost per hectare (Rp.)	Cost per parcel (Rp.)
Ground survey <sup>14</sup>	800,000	80,000	1,600,000	80,000
Aerial photo (corrected) <sup>15</sup>	100,000	10,000	100,000	5,000
Satellite image (corrected) <sup>16</sup>	25,000	2,500	25,000	1,250

BPN registration officials have warmed to the idea of allowing less precise measurement of boundaries, and have included provisions to allow use of satellite and aerial photography in the draft regulation on land registration. Drafters have also concluded that the regulation should provide that during sporadic initial registration, ground surveys must be used in conjunction with area registration base maps to ensure that the boundaries of ground surveyed parcels do not overlap with other parcels.

#### *Abolition of unnecessary certification processes*

A second, and perhaps more important, barrier to registration of land rights in Indonesia is BPN's practice of requiring that land owners purchase a "stipulation" confirming that the land to be registered is not State land. Land owners whose rights are derived from any source—including rights based on *adat* (customary law) and rights based on occupation of land for more than 20 years—are required to obtain a Government "stipulation" in order to register their rights. Such stipulations are not only extremely expensive, they appear to serve no legitimate purpose.

Although no law requires such a stipulation as a prerequisite to registration, BPN requires it in practice. This practice appears to be motivated both by the Ministry of Finance's desire to collect revenue for the certifications, and by BPN officials' fear of accidentally registering State land in the ownership of a private individual, thus incurring liability or

<sup>13</sup> These calculations describe only the costs associated with the images and the maps derived from the images. In order to convert the maps into registration maps, the registrar must assign numbers to parcels and relate parcel boundary data to ownership data. This administration might cost as much or more than the maps themselves, but should be the same regardless of the mapping regime used.

<sup>14</sup> Ground surveys cost approximately Rp. 80,000 per parcel, and the cost does not vary significantly for the expected size of agricultural and residential parcels found in rural Indonesia.

<sup>15</sup> BPN staff state that aerial photos cost approximately Rp. 100,000 (\$11.00) per hectare, including GPS correction.

<sup>16</sup> BPN staff knowledgeable about satellite images state that the images typically cover an area of 6000 hectares, and that 50 maps could be purchased and corrected using GPS technology for a total of Rp. 7.5 billion, which is the equivalent of \$829,646 at the current exchange rate of roughly Rp. 9,040 per USD. This translates to a cost of Rp. 25,000 (\$2.76) per hectare.

administrative sanction. These sales of stipulations may also provide increased opportunities for rent-seeking by officials. This practice of requiring Government stipulations as a prerequisite to registration is counterproductive to the long-term interests of both land owners and the general society.

The sale of these certifications amounts to a reintroduction of the “*domein*” concept that Indonesian lawmakers rejected in 1960 in the Basic Agrarian Law. According to the *domein* concept, which was introduced during Dutch rule, the State owns all land that the State has not titled in the name of a private person or legal entity. The Basic Agrarian Law rejected the *domein* concept, declaring that the basis of land rights in Indonesia depends upon *adat* (customary law) rather than grants from the State. Although the precise number is not known, it is reasonable to believe that the overwhelming majority of the 60 million private parcels not yet registered are “owned” by citizens who base their claims on customary law.

To obtain the stipulation, the landowner must pay the government an excise tax equivalent to five percent of the value of the land. This tax greatly reduces the incentive to register the land. In fact, a five percent tax might as well be a 25 percent tax when the landowner is not realizing any immediate cash benefit from registration. BPN officials responsible for land registration acknowledge that the stipulation process discourages registration, but the stipulation process is administered by other departments within BPN.

#### *Accountability for registration of transactions*

Although the system for registering land transactions does function, there is general agreement—including among knowledgeable BPN officials—that the system does not provide affordable and timely service to the public. There is a perception that the high cost and inconvenience of dealing with the registration system—both for initial registration of ownership and for subsequent transfers—dissuades many citizens from registering their land rights. In effect, citizens prefer to hold and transfer their land rights without registering these rights.<sup>17</sup>

Improvement of the process for registration of land transactions is important for at least two reasons. First, such improvement is an important end in itself since land owners deserve to receive prompt and professional registration services at an affordable price. Although the government regulation alone cannot ensure that registration services will improve—this will require other adjustments, including improved management of the local BPN offices—changes to the regulation can help to eliminate unnecessary processes and unnecessary delays that give shelter to corrupt practices.

Second, So long as registration of subsequent transactions remains cumbersome and subject to corrupt and unpredictable practices, land owners are likely to resist entering the system. Improvement of the transaction registration process can encourage land owners to “opt in” to the registration system by requesting initial registration of their ownership.

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<sup>17</sup> The Basic Agrarian Law No. 5 of 1960 is generally interpreted to mean that land owners may transfer their ownership through civil agreements even though the rights of the owner are not registered in the state land registration system before sale, and the rights of the buyer are not registered after sale.

While the issues confronted in revision of the registration system are too numerous to list fully, illustrative issues include the following:

- The system for registering land rights does not include a State guarantee of rights, and does not allow citizens to examine copies of documents from the registration archive. Absent a State guarantee, citizens who wish to acquire rights to land should have access to information from the registration archive so they can confirm the validity of rights they are acquiring.
- The land registration system relies upon private “deed making officials” (PPAT’s) to notarize and validate transactions, but does not require either these officials or registration staff to confirm the validity of the transferor’s rights prior to executing transfer documents. The regulations should obligate officials to make such confirmations, and to compensate owners and others who suffer losses as the result of mistakes that could be avoided by inspection of registration records.
- The public cannot depend upon registration offices to register rights and provide other services within fixed time periods since the local BPN offices retain wide discretion to turn away applications for registration. Delays in registration create an environment that makes corrupt practices both more likely and harder to discover.

BPN drafters have agreed to address some of these issues in the latest draft of the regulation on land registration; however, the changes are incremental, and more will be left to be done on these issues in future regulations and laws on land registration.

### *Land registration fundamentals*

BPN has expressed its intention to draft a new law on registration of land rights. Until now registration has been governed by government regulations. Courts have refused to enforce some provisions in these regulations, citing conflict with the Civil Code. For the land registration system to be robust, and for the legal significance of land registration to be clear, a law on registration of land rights is needed.

A law on registration of land rights could, for example, help to clarify the relevance of unregistered possessory rights to land. In cases where a person has occupied land for a considerable period of time, but has not registered his claim, it is not clear whether his physical possession creates a right to the land. Nor is it clear whether a registered owner of land might lose his rights to land by, for example, ignoring the land for long periods of time. In addition, current law does not protect citizens who rely upon data in the land registry when purchasing land. Also, there currently exists no adequate method by which tribal communities can register claims to land. Clear rules on these and other issues would reduce the uncertainty now associated with land transactions, thus reducing transaction costs and encouraging more efficient use of land.



## *Prognosis*

Much work remains to be done to improve the legal framework that shapes land registration practice. Meaningful progress is likely to require leadership from the highest levels of Government to coordinate and direct the efforts of BPN, the Ministry of Finance and the Office of Land Tax (which is subordinated to the Ministry of Finance). While there is probably much that BPN could do to streamline the registration process, some obstacles appear to be the result of fiscal policies that tax the initial registration of land, as well as national budget policies that fail to appropriate sufficient funds for systematic aerial or satellite mapping of parcels.

In addition to the huge challenge of mapping and registering the 60 million unregistered parcels owned by individuals, Indonesia must begin to map and register the *ulayat* communal claims of *adat* (customary law) communities, many of whom continue to dwell in the country's vast forests. Quite apart from questions regarding the nature and breadth of *ulayat* rights—issues that are the subject of other laws—the task of mapping and registering the territories subject to those rights will take many years.

Redesign of the existing inefficient land registration system is possible in Indonesia. BPN officials have the skills to prepare the necessary laws and regulations, but lack direction and adequate funding from the Government. BPN policymakers and legislative drafters would benefit from additional outside technical assistance, and that assistance will be most effective once the Government assigns a high priority to redesigning and revitalizing the land registration program.

### **Drafting topic 3: eminent domain**

Eminent domain proceedings in Indonesia are governed by Article 18 of the Basic Agrarian Law of 1960, which provides:

“In the public interests, including the interests of the Nation and State as well as the common interests of the people, the rights on land may be annulled, with due compensation and according to a procedure laid down by act.”

Although no “act” (law) was ever enacted, the practice of taking private land for public purposes is regulated in practice by Presidential Decree No. 55 of 1993, “On Land Acquisition in Implementation of the Development for Public Purpose.” This regulation includes a list of fourteen broadly defined public purposes for which the State can compulsorily acquire private land, as well as a process for by which the State will acquire the land and compensate owners and users who are forced to cede their land rights.

Although the list of public purposes contained in Decree No. 55 is more or less sound, the process provided in the decree has proven wholly inadequate to protect the interests of rightholders. During the Suharto regime, Government officials abused the process to acquire lands for purposes that were stated to be public, but which turned out to be private. Lands in downtown Jakarta, for example, were acquired for the announced purpose of building public sports facilities, but were used to construct privately owned shopping malls, hotels and other commercial ventures. In rural areas, many agricultural lands were acquired by the Government and handed over to plantation developers.

Those who lost their land in these schemes were reported to have received much less than market value of the land taken. Even in cases where the Government took land for public purposes—such as the construction of reservoirs to create hydroelectric power—landowners and land users complained that the process did not provide adequate compensation for the land taken.

### *The BPN draft law*

In May 2000, the Indonesian Cabinet Secretary approved BPN's proposal to begin work on a draft law "On Land Provision for Public Interest." The draft prepared by BPN during 2000 preserved the focus of Presidential Decree No. 55, but provided a much improved process for calculating and paying compensation. On a separate track, Professor Maria S.W. Sumardjono completed a draft law "On Land Acquisition for Development Activities" during 2001. As the name implies, this draft allows the use of Government power to acquire private land not only for purely public purposes—such as building schools and public roads—but allows private developers to use Government power to acquire land for purely private commercial "development activities"—such as construction of private hotels, factories and plantations.

When Professor Sumardjono was appointed as Vice-Chairman of BPN in February 2002, BPN drafters substituted her draft as the organization's working draft of this law. Between November 2001 and November 2003, BPN held at least six public consultations to discuss the draft. Representatives of civil society groups who attended the public consultations objected to the draft, accusing BPN of siding with commercial interests to acquire private land for private development rather than public purposes. Despite these criticisms, apart from the addition of cross-references to existing laws in the preamble of the draft, the draft did not change as the result of any of the public consultations. The body of the text of the draft in November 2003 was word-for-word identical to the 2001 draft.

### *Importance of focus on public purposes*

RDI has agreed with the views of civil society groups in this debate, recommending that the draft law not allow use of Government power to assist private corporations or individuals to acquire private land for commercial development activities. Requiring private developers to negotiate with private owners to purchase land for development has several merits, including the following:

- First, this approach ensures that landowners receive full market value for their land since no landowner will sell his land to the developer unless the landowner is satisfied with the price offered by the developer.
- Second, this approach reduces resistance to the private development by the local community since it reduces or eliminates the use of coercive tactics by the developer.
- Third, the voluntary acquisition of land for private development greatly reduces the role of government in the process of private development. This would allow government officials to focus their efforts on acquiring

land for purely public development needs, such as public schools, etc. This would also reduce public perceptions that government officials engage in rent seeking rather than acting in the public interest.

#### *Other important protections*

If the law adopted ultimately allows the Government to take private land for allocation to private commercial activities, the law should ensure that the landowners are treated fairly. For example, the draft law provides that the developer acquiring the land must pay honoraria to the Government committee charged with implementing the land taking. This creates an obvious conflict of interest since the committee should represent the interests of the public, and it will be virtually impossible for the committee to represent the interests of the public if the developer acquiring the land is paying honoraria to the committee. RDI has recommended several ways of avoiding this conflict of interest by structuring the payments of committee members in a way that their decisions—including decisions not to allow the land acquisition—do not in any way influence their compensation.

RDI has also recommended:

- The Government committee overseeing the land acquisition process should be responsible to defend the rights of citizens and ensure that the organization acquiring land fulfills all obligations under the law and according to the agreement with citizens losing land.
- In cases where a land parcel is subject to several rights, the law should provide a fixed formula for determining how rightholders divide the compensation. For example, if a citizen leases in land from a landowner, the law should specify how much compensation the landowner and the lessee will each receive. Other rules are necessary regarding the rights of holders of security interests where the landowner has pledged the land as security for a loan.
- If the law will allow the use of Government power to acquire land for private development, the law should require the Government to guarantee payment of all compensation owed by the organization that acquires the land.
- Where the Government acquires land for public purposes, the law should require it to pay the replacement value of the land, and should define the replacement value as the cost of acquiring equivalent land within the same district and within a reasonable distance from the land taken. If the law allows the Government to acquire land for private development activities, the law should require the developer to pay the market value of the land or its replacement value, whichever sum is higher.
- Where the Government acquires land occupied by residential buildings, the law should require it to pay the land owner at least the replacement value of the house or apartment—that is, the amount of money necessary to purchase an equivalent size house or apartment in the same district.

### *The alternative draft law*

Eminent domain was selected as one of two topics to be the focus of BPN training in legislative drafting during February 2004. RDI invited eight civil society groups to participate in the drafting training and collaborate with the BPN drafters. That effort produced a concept paper for an alternative draft law that would preserve the existing limitation on use of Government eminent domain power, allowing compulsory acquisition of private land only for public purposes. Between March and August 2004 this group of BPN drafters and representatives of civil society groups continued to meet under RDI's sponsorship to develop an alternative draft law on eminent domain. This draft remains under development. During October 2004, the civil society groups and BPN again asked RDI to sponsor another drafting workshop to continue this work.

### *Prognosis*

Although the current BPN draft law on eminent domain contains a number of good provisions, these are outweighed by the draft's inclusion of private development projects within the scope of eminent domain power, as well as a number of provisions that benefit private developers at the expense of landowners. The alternative draft being developed by a group of civil society group representatives and BPN officials correctly focuses on limiting the eminent domain power to public purposes, but the procedural provisions in the draft require much more development.

In these circumstances it would be useful to provide additional technical assistance to both BPN and the civil society groups interested in developing this draft law. These parties approached RDI in October 2004 with a request for additional support.

### **Drafting topic 4: land rights**

Since 1960, the fundamental law defining land rights has remained the Basic Agrarian Law. The Basic Agrarian Law defines the fundamental types of rights that may be held by private individuals and legal entities, and describes the role of the State with regard to its direct use of land as well as its regulation of private rights and private uses of land.

Although the Basic Agrarian Law No. 5 of 1960 refers to the need for a law on land rights, no such law has been prepared for 44 years. As of 2000, BPN had begun working on a law on land rights and had solicited and received RDI comments on the draft at that time. But BPN shelved this work early in 2001 as it began focusing on other institutional priorities. Presidential Decree No. 34 of May 31, 2003 placed this task back on the agenda, instructing BPN to prepare a draft Law on Land Rights no later than August 1, 2004.

A designated group at BPN prepared the draft law in some secrecy during the early months of 2004, not revealing the draft to RDI until shortly before BPN presented the draft to the public on July 15, 2004. However, RDI was permitted to review the concept paper prepared by the BPN drafters in October 2003 and provided extensive comments to the group, both in writing and during meetings that November.

As drafted at BPN, the Law on Land Rights covers part of the ground now covered by the Basic Agrarian Law, but provides greater detail regarding the process by which private rights to land—principally ownership and various use rights—arise, are recognized by the State, and are registered by the State. In this way, there is a great deal of overlap between the draft Law on Land Rights on the one hand, and both the Basic Agrarian Law and the Government Regulation “On Land Registration” on the other.

#### *Government stipulations and the “domein” concept*

RDI remains uncomfortable with the draft law prepared at BPN. That draft threatens to undermine existing customary rights of many millions of Indonesian families and make the formalization of land rights much more expensive and uncertain in the future. The scheme proposed by BPN would provide that citizens who have not yet registered their land ownership rights, and who claim those rights based on longstanding individual use in accordance with custom, are no longer entitled simply to register their ownership rights. Instead, claimants would be required to obtain a document from BPN—a Government “stipulation”—to confirm that the claimed land is not State land.

While this may not seem like much of a change, it represents a radical reversal in Indonesian land relations. Since 1960, the primary basis for claiming property under Indonesian law has been *adat*, or customary law. The Basic Agrarian Law rejected the Dutch concept of “*domein*,” whereby the State claims ownership of all land and claims the power to allocate land with or without regard to customary use patterns. According to the *domein* concept, until a parcel of land has been affirmatively granted by the State and registered in the State land registry, the land remains State land. In rejecting this concept, the Basic Agrarian Law established that Indonesian citizens trace their property rights to *adat*, and the State does not have authority to ignore these rights. Although the Basic Agrarian Law empowers the State to regulate the use of land, it is at pains to provide that the State does not own land and does not act as a land owner.

BPN should continue to require claimants to present documentary and oral evidence to justify their claim of ownership of land based either on *adat* or use of the land for the period prescribed by law. If the State is concerned that a particular area of land is State land, it should have the burden of identifying such land and presenting evidence that the land has not been subject to customary claims that preceded the creation of the country in 1945. It is unreasonable for the State to establish a presumption that all unregistered land is State land, but that is the import of the draft law prepared by BPN.

The stipulations required in the draft law to overcome this new presumption are extremely expensive. The Ministry of Finance collects a fee equal to five percent of the value of the land. This fee might be affordable if the land owner were registering his land rights in order to transfer them through sale since in that case the land owner could finance the stipulation fee from the sale proceeds. However, most land owners who might wish to register their land rights will continue using the land for many years before selling it. Land owners simply have no savings with which to finance the payment of the stipulation fee.

By requiring land owners to apply for Government stipulations, the draft Law on Land Rights greatly expands the power of the State, as well as BPN as the agent of the State responsible for issuing the stipulations. Land owners who are unable to afford to

purchase the stipulations must endure the threat that the State will assert claims over the land since the State has not formally recognized the private claim to the land. Since land rights cannot be registered in the land registry until the land owner obtains the stipulation, the stipulation process serves as a strong disincentive to registering land.

#### *Other considerations*

In addition to recommending that BPN reject the *domein* concept, RDI made a number of recommendations to improve the draft law, including the following:

- The law should not require land owners who base their claims on *adat* (customary law) to register the claims since there is a danger that such a requirement could be construed to undermine the continuing legality of unregistered rights. Rights to roughly 60 million parcels are not yet registered in Indonesia, and BPN is not equipped to register more than a small fraction of that amount each year. A mandatory registration requirement would place an unfair burden on land owners.
- The law should not provide that private rights to land may only be based upon documents of entitlement. Many land owners do not have documents of entitlement (which are not required by *adat*) even though they and their ancestors have occupied the land for generations.
- The law should provide that initial systematic registration of land rights is the obligation of the Government since the Government has the capacity to map and register parcels.
- The law should abolish the practice whereby the Government grants use rights on communal land claimed by customary law communities, and instead require loggers and others to contract directly with the affected community under oversight provided by the Government.
- The law should provide strong protection to individuals who register ownership rights to land and openly occupy the land for a given period following registration (perhaps five or ten years). The law should not allow such rights to be challenged unless it can be proved that the owner committed fraud. No such protection exists under the law today, and registered rights may be challenged at any time by someone claiming superior rights.
- The law should provide clear procedural safeguards for land owners and land users in cases where the Government seeks to cancel such rights based on claims of non-use, improper use or for other reasons. The draft prepared by BPN provides no such safeguards, but apparently empowers Government officials to cancel rights at their discretion.

RDI attempted, without success, to persuade BPN drafters to prepare a more progressive draft Law on Land Rights to protect the interests of ordinary Indonesian land owners. RDI

also circulated comments to civil society groups interested in agrarian issues and attempted to motivate them to become interested in the topic.

On July 15, 2004 RDI attended a public consultation arranged by BPN to present the draft law and to invite input from other ministries, academics and civil society groups. Unfortunately, the draft law was not circulated until the proceedings began, forcing attendees to scan the draft as BPN began its presentations. The reaction of academics and civil society groups was uniformly negative, and questions were raised regarding the necessity of the law, its inconsistency with the Basic Agrarian Law, and the motives of BPN in preparing the draft. BPN proceeded to submit the draft to the Government in July, and in September 2004 the Government returned the draft to BPN for further work.

### *Prognosis*

A Law on Land Rights, if enacted, will have far-reaching impact for many years to come. Although it would be useful to have such a law to define better the rights and obligations of both citizens and the Government with regard to private land rights, it would be better to have no law on land rights than to have the draft law submitted to the Government.

Preparation of a progressive, forward looking law is likely to require leadership from the Government, and a commitment to delving into the procedures and processes that currently threaten citizens with loss of their land rights. It will be important for civil society groups and academics to become more engaged in the process and to play a roll in helping to shape the law.

Preparation of a Law on Land Rights would benefit from outside technical assistance, including training other branches of the Government, civil society groups and academics regarding the importance of land rights and ways in which a land rights law could be designed to strengthen the sense of private land ownership and reduce current barriers to claiming secure ownership rights.

### **Drafting topic 5: Basic Agrarian Law**

Enacted in 1960, the Basic Agrarian Law has long served as the primary law governing land relations on agricultural and residential land. Even though the Basic Agrarian Law purports to apply to all lands and airspaces in Indonesia, since its adoption in 1967 the Basic Forestry Law has been interpreted as replacing the Basic Agrarian Law in the three-quarters of Indonesia classified as forest.<sup>18</sup> In practice, the Ministry of Forestry denies the relevance of the Basic Agrarian Law with respect to lands designated as forest in Government planning documents, regardless whether the land is actually planted with trees. In much the same way, the Ministry of Energy and Mineral Resources denies the relevance of the Basic Agrarian Law in the areas subject to the Law on Basic Provisions of Mining of 1967.

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<sup>18</sup> Law No. 5 of 1967 "On Basic Provisions on Forestry" was replaced by Law No. 41 of 1999 "On Forestry Affairs." Like the old forestry law, the new law does not recognize the application of the Basic Agrarian Law in forest areas.

Although the Basic Agrarian Law probably represented a good (and even ingenious) compromise among various political forces at the time of its enactment in 1960, the law may no longer adequately serve the purposes for which it was developed. In fact, the law is in many ways aspirational rather than practical, and it may be the symbolic value of the law which generates such enthusiasm among those who would preserve it against change.

#### *Shortcomings in the current law*

Because the Basic Agrarian Law was drafted by populists, it is presumed—against overwhelming evidence to the contrary—to provide real protection to the interests of common people. In fact, the approach taken in the law, which was to empower the State to define and protect the interests of the people, has been subverted for the past four decades by Government administrations which defined the national interests in ways that did not benefit large segments of the population, and that forced some segments of the population to relinquish their land, causing them to bear a disproportionate share of the costs of the nation's economic development.

The law is filled with vague statements to the effect that Indonesian land must be used to advance the interests of the people. But the law contains no substantial limitations upon Government power to use land claimed by citizens in ways that those citizens find objectionable. The Government remains relatively unconstrained in its ability to appropriate land and allocate it to serve interests of private and State corporations.

#### *Rejection of the BPN draft*

Of course, if one is concerned about strengthening legal protections for land rights of private citizens and customary law communities, one would be reluctant to see even a vaguely protective law replaced by a law that does not value such citizens and communities. This appears to be the situation with respect to the question of reforming the Basic Agrarian Law; that is, will it be preserved as it is, a law strong on populist symbolism and vague protections, or will it be amended by technocrats who would craft a law that is less vague, but also even less protective of the interests of ordinary citizens?

BPN has been working for several years on a draft law "On National Land Affairs" to replace the Basic Agrarian Law. In May 2000 the Indonesian Cabinet Secretary approved BPN's request for permission to begin drafting revisions to the law. RDI provided comments on the BPN draft law in April 2001, several months prior to the beginning of the project.

In March 2001 BPN held a public consultation to present its draft law to replace the Basic Agrarian Law. Representatives from other ministries, universities and civil society groups attended. The reaction of the civil society groups was overwhelmingly negative. As a result, BPN's work on the draft stalled and remained stalled for two years, until the fall of 2003, when BPN returned to drafting a replacement law in response to Presidential



Decree No. 34 of May 31, 2003.<sup>19</sup> That decree obligated BPN to present a draft law no later than August 1, 2004.

RDI met with BPN drafters during November 2003, but did not enjoy good access. RDI attempted, without success, to persuade BPN to modify its draft so that it would sustain and advance the spirit of the existing Basic Agrarian Law. RDI's principal concerns are that the BPN draft would abandon the longstanding state aspiration of ensuring that all Indonesians have access to land, would undermine existing customary rights of Indonesian families, and would needlessly concentrate power in the hands of land administrators. The BPN official responsible for preparing the latest draft was reluctant to receive input from RDI. RDI nevertheless continued preparing and circulating its commentaries on the draft law to BPN staff and representatives of civil society groups.

BPN prepared a draft that departs significantly from the existing Basic Agrarian Law. It presented the draft at a public consultation in April 2004, where it encountered vigorous opposition and protest from a number of civil society groups. These groups mounted their own offensive against the draft, preparing numerous critiques and organizing workshops to discuss ways of challenging the draft. As with the draft Law on Land Rights, BPN submitted this draft law to the Government in June 2004, and in September the Government returned the draft to BPN for further work.

### *Prognosis*

The Basic Agrarian Law represents one area of land law in which civil society groups are firmly engaged. Discussion regarding the future of the Basic Agrarian Law represents a good forum for assessing the commitment of the Government to adopting land use policies that are friendlier to farmers, *adat* law communities who reside in forests, and ordinary citizens. The symbolic importance of the law should not be underestimated.

However, the practical importance of the law should also not be overestimated. In its present form the Basic Agrarian Law does not contain clear standards for protecting land rights of any group. The introduction of clear standards and clear protections would probably require a thorough overhaul of the law.

Although the Basic Agrarian Law could be amended to introduce clear protections of private land rights of individuals and traditional communities (and clear restrictions on State powers to interfere with such rights), such protections might not be acceptable to all social groups. Although such protections and limitations would likely be accepted by the overwhelming majority of farmers and other citizens, some civil society groups are suspicious of private land rights and resist the idea that land should be, as it is sometimes put with derogatory connotations, a "commodity" that can be purchased and sold in the market. Such suspicions, which are occasionally expressed in the rhetoric of anti-capitalism, appear to motivate an influential portion of civil society groups interested in these issues.

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<sup>19</sup> Although BPN describes its draft law as amending the Basic Agrarian Law, it would replace that law almost entirely.

It is not easy to see how the current stalemate over the Basic Agrarian Law will be resolved. Civil society groups determined to preserve the populist sentiments expressed in the law will likely resist any attempt to change the law other than to restore the law's authority over forest and mining areas. The Ministry of Forestry and the Ministry of Energy and Mineral Resources will not relinquish authority over such lands to any other ministry. The law may not soon provide protection to land owners or clarification of land owner rights.

While it will be important to monitor development of this issue, it is not clear that technical assistance will be very useful since the questions raised are essentially political and the parties involved are not likely to modify their views soon.

### **III. TRAINING AND RESEARCH**

#### **Training in legislative drafting**

During July 2002 and again during February 2004 RDI cooperated with Professors Robert and Ann Seidman of Boston University to provide training in legislative drafting theory and techniques to BPN officials, UI associate professors and representatives of other Government ministries.<sup>20</sup> We organized both sets of training in cooperation with the USAID-funded ELIPS II Program in Jakarta.

The July 2002 participants were divided into two groups: one dealing with revisions to Government Regulation No. 224 of 1961 "On Land Redistribution" and one dealing with revisions to Government Regulation No. 24 of 1997 "On Land Registration." The February 2004 participants were divided into two groups: one working on the draft law on eminent domain, and the second working on revisions to the Government Regulation No. 37 of 1998 "On Land Deed Making Officials." These teams participated in training alongside teams from other ministries working on bankruptcy law, money laundering and other legislative initiatives.

The Seidman training is truly unique among legislative drafting courses. The training focuses on strategies for identifying and defining social problems and identifying actors who should be tasked with resolving each problem. Too often, legislative drafters simply copy legislation from other countries, or draft legislation without carefully analyzing what behavior society should attempt to influence in order to obtain some publicly desirable result. The Seidman training involves a hands-on approach in which participants must explain and defend their ideas to non-specialists drawn from other parts of the Government and civil society. BPN participants were tasked with preparing reports explaining the problems in land registration, access to land, the eminent domain process and land transaction formalities that they sought to address.

One recurring theme in the training was the need to identify precisely "who does what"; in other words, which government official or citizen is responsible to take what action. In the

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<sup>20</sup> July 2002 participants included 15 BPN officials, two UI associate professors, two representatives of SEKAB and three representatives of the Ministry of Agriculture. February 2004 participants included nine BPN officials and eight representatives of civil society groups interested in agrarian and natural resources issues.

case of registering land rights, for example, rather than provide that “land shall be registered,” the government regulation should provide either that “the holder of the land right is obligated to present information to (specified) government officials for registration,” or “(specified) government officials shall investigate land rights and register them.” This is a generalization of the concept, but serves to illustrate how legislation can be made more clear.

Following the training, BPN participants strived to apply the concepts to the detailed revision of three Government regulations: Government Regulation No. 224 of 1961 “On Land Redistribution,” Government Regulation No. 24 of 1997 “On Land Registration,” and Government Regulation No. 37 of 1998 on “Land Deed Making Officials,” with noticeable improvements in the drafts. Following the second session, a number of representatives of civil society groups continued to meet BPN drafters to work on an alternative draft law concept for the law on eminent domain. These meetings continued from March until August 2004, and produced a concept paper and preliminary draft legislation.

The legislative drafting training provided by Professors Robert and Anne Seidman was a definite success. It benefited BPN drafters who were actively engaged in preparing draft regulations and laws, as well as representatives of civil society groups who were willing to work with BPN.

Because BPN tends to be a rather secretive organization, and not eager to disclose drafts before they are finalized and ready for presentation to the public, additional technical assistance might be needed to persuade BPN to take advantage of such training and to help drafters get the most out of the training.

### **Gender research**

During July 2002 RDI completed two weeks of field work in rural districts of Central and Eastern Java to assess women’s access to land, and specifically the incidence of registering land ownership in the names of both husband and wife (joint titling). The research team also included a member of BPN’s central staff. The team interviewed landowning couples, registration officials, and notaries involved in land transactions.

The research revealed that despite the fact that Indonesian law deems all property purchased during marriage to be jointly owned by both spouses, few parcels of land are being registered in the joint names of husband and wife. The researchers nevertheless concluded that, for reasons specific to Javanese culture, the lack of joint titling does not appear to significantly threaten land rights of Javanese women.

Following the field work the research team presented the findings to BPN staff in Jakarta, which included specific recommendations for increasing safeguards for women’s rights during the registration process. Results of the field work and related recommendations were presented in August 2002 in a report entitled “Registration of Land and Women’s Land Rights on Java.”

In the latest drafts to revise Government Regulation No. 24 of 1997 “On Land Registration,” BPN drafters have agreed to allow, but not require, titling of land in the

name of both spouses. There is some resistance to acknowledging that such protections are needed, or to interfering in the decisions of families regarding registration of land.

#### **IV. RECOMMENDATIONS FOR FURTHER WORK**

Design and implementation of progressive legal and regulatory framework governing land relations in Indonesia will remain a challenge for some years to come. The development of sound policies and laws acceptable to citizens, and also acceptable to the bureaucracies that must implement them, will require a great deal of dialogue among the various stakeholders, as well as a great deal of understanding and a great deal of work. In the current era of decentralization of Government functions, the design and implementation of sound land policies poses unique challenges. Indonesian planners are only beginning to deal with these challenges, and their response has been inadequate.

If reform of land policy and law continues to be ignored by the broader Government, the problems created by inadequate policies and laws will only worsen in coming decades. An unsound legal and regulatory framework for land relations will especially harm the poor, will lead to underinvestment in the economy, and will suppress the value of land in Indonesia. These issues deserve much more attention by the Government of Indonesia, by citizens and their representatives, and by the international aid community.

#### **Engaging stakeholders**

##### *Land Management and Policy Development Project*

With financial assistance from the World Bank, the Government of Indonesia has undertaken to promote development of land policy and improve the existing regulatory framework as part of the Land Management and Policy Development Project, which was launched in June 2004 and will continue until December 2009.

Of a total loan budget of US\$87.62 million, a total of US\$2.94 million will be devoted to Component 1: "Development of Land Policy and Regulatory Framework."<sup>21</sup> Although BPN will serve as lead agency for the project, this component of the project will be managed by Bappenas. Overall guidance of the project will be provided by the Land Management Policy Development Project (LMPDP) Steering Committee.

Other components of the project include: Component 2: "Institutional Development, Capacity Building and Training" (led by BPN, budget US\$9.29 million); Component 3: "Implementation of an Accelerated Land Titling Program" (led by BPN, budget US\$66.62 million, comprising over three-quarters of the total project); Component 4: "Development of a Land Information System" (led by BPN, budget US\$2.86 million); and Component 5:

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<sup>21</sup> World Bank, "Project Appraisal Document on a Proposed Loan and a Credit in the Amount of SDR21.9 Million (US\$32.8 Million Equivalent) to the Government of the Republic of Indonesia for a Land Management and Policy Development Project" (March 31, 2004), at 32 - 33. The total US\$87.62 budget will be funded by the World Bank (US\$32.8 million), the International Development Association (US\$32.8) and the Government of Indonesia (US\$22.02). *Id.* at 1.

“Capacity Building Support for Local Government” (led by Ministry of Home Affairs, budget US\$5.91 million).<sup>22</sup>

We consider that the success of Components 2 through 5 will depend in large part on the creation of appropriate policies, laws and implementation parameters in Component 1. For example, acceleration of the land titling program will require adjusting current land policies that currently include imposition of high taxes for initial registration of land rights and use of overly precise (and therefore expensive) mapping techniques. Such changes would require modification of laws and regulations. These policies and laws should be debated and decided by the Government of Indonesia rather than separately by BPN and the Ministry of Finance. Appropriate technical assistance will be critical to help Bappenas and other stakeholders to define the issues and explore solutions that require compromise by the various ministries and agencies involved.

### *The Government of Indonesia*

The Government of Indonesia must take a greater interest in the impact which current land policies and laws have on citizens and investors, with particular attention to the impact these have on the poorest families. The Government must establish goals and priorities for BPN, and it must allocate sufficient budget resources to accomplish goals, particularly with respect to completing initial land registration throughout the country. The Government must also coordinate policies of the Ministry of Finance (and the Office of Land Tax within the Ministry) to ensure that these are consistent with land policy goals. A step in this direction has been the creation of the Coordinating Team for Land Affairs, which includes representatives of BPN, the Coordinating Ministry for Economic Affairs, Bappenas and the Ministry of Home Affairs.

### *BPN*

Because it is necessary for national land policy and law to be developed by the central government, BPN staff should continue to play a major role in developing that framework. Some policymaking functions cannot be devolved to regional government since to do so could lead to a balkanization of policies and confusion over the meaning of basic land rights and the inconsistent application of basic protections to rightholders.

Although BPN employs many officials who possess the necessary skills and experience to design sound land policies and laws, the organization is not oriented in any coherent or predictable way towards developing policies and laws that help citizens or promote socially responsible development. Once the Government of Indonesia decides that a forward-thinking legal and regulatory framework for land relations is a priority, many BPN officials will be in a position to respond and to help develop appropriate policies and laws. Even if BPN is merged into another central agency, as has been discussed from time to time, it is likely that the career BPN staff who are absorbed into that agency will continue to exercise influence over the path of policy development.

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<sup>22</sup> *Id.* at 41.

### *Bappenas, Ministry of Home Affairs and Ministry of Finance*

Bappenas has been designated to play a key role in the development of national land policy under the LMPDP, as described above. The Ministry of Home Affairs will oversee development of land administration at the kabupaten level under a separate component of the same project. The Ministry of Finance, while not involved directly in the LMPDP, will play important roles in shaping land policy through the national budget process and tax policy. Each of these stakeholders will require technical assistance to make informed decisions regarding the contribution of various land and fiscal policies in promoting economic development and reducing poverty.

### *Kabupatens*

The role of the kabupatens is particularly important with respect to two issues: (1) resolution of land conflicts, and (2) alleviation of landlessness and land poverty.

With the Government's anticipated adoption of the regulation "On Land Distribution and Payment of Compensation," the kabupatens will acquire a potent new tool for addressing land conflict issues and alleviating landlessness through distribution of land. BPN has already begun considering which kabupatens might be appropriate places to launch pilot projects to test the procedures contained in the regulation.

In addition, the LMPDP project will work in five pilot kabupatens to train local land administration staff in a variety of topics, including land dispute resolution.<sup>23</sup> RDI has encouraged the World Bank and LMPDP staff to include land distribution as an additional focus of the training.

### *Civil society groups*

Civil society groups can play a critical role in the development of sound land policy and law, implementation of various land policies, and monitoring of land officials in the performance of their duties. Indonesian citizens are more likely to trust civil society groups than government officials, and such groups have traditionally provided a political counterweight to the bureaucracy in matters of public policy development, adoption of laws and implementation.

To be more effective in the arena of land policy development, representatives of civil society groups require training and information regarding what are too often considered to be technical aspects of regulating and administering land relations. It is often the "technical" components of such regulation which compromise land rights and impose obstacles to land access by the poor. This is notably an area in which "the devil is in the details." Such groups will be more effective watchdogs if they understand the ways in which bureaucrats take advantage of gaps and ambiguities in regulations and laws to exercise discretion.

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<sup>23</sup> Based on experience with the pilot kabupatens, training workshops will be expanded to include all kabupatens by the end of the project.

Civil society groups would also benefit from training regarding the benefits of private rights to land and functioning land markets. There is a moderate degree of distrust among Indonesian civil society groups for private land rights and free land markets. Such rights and markets need not operate to disenfranchise the poor.

### **Need for technical assistance**

Technical assistance is needed. Indonesia's land problems are complicated, and in many cases the bureaucracies responsible for resolving problems end up contributing to or exacerbating problems. Some issues require a fresh approach and a thorough reworking of solutions.

Although our just-completed project has achieved some success in working with various BPN departments, BPN is likely to require additional assistance in the next few years, especially if the new Government prioritizes land relations in its promotion of economic development and assault on poverty.

Technical assistance of the type that has been provided to BPN under this project would also benefit other agencies and ministries, including the Office of the Cabinet Secretary, the Coordinating Ministry for Economic Affairs, Bappenas, the Ministry of Home Affairs, the Ministry of Agriculture, the Ministry of Finance and the Parliament, as well as the Coordinating Team for Land Affairs currently charged with developing national land policy. Similar, but separate, technical assistance would benefit the staff of civil society groups that focus on agrarian and natural resource issues.

Additional technical assistance would be useful in the implementation of pilot projects to implement the regulation "On Land Distribution and Payment of Compensation," when this is adopted, as described further in the first of the following policy recommendations.

### **Policy recommendations**

#### *Land distribution*

President Yudhoyono will likely sign the draft regulation "On Land Distribution and Payment of Compensation" early in his administration. It will then be necessary to develop a presidential decree to establish a national commission to oversee implementation of the regulation. BPN officials responsible for implementing the regulation are interested in conducting small pilots in several kabupatens whose leaders are well disposed towards resolving land conflict issues and providing landless and land poor farmers with access to land. RDI has encouraged several civil society groups to become engaged in this pilot program. RDI has also recommended that at least one site should involve creation of small *pekarangan* (homegarden plots) for distribution to poor rural families.

BPN and the implementing civil society groups would benefit from technical assistance in drafting the presidential decree, designing the pilot program, and implementing the program. It is important to minimize costs to ensure that the program is replicable. Each pilot effort should be independently monitored to measure the costs and benefits. It is

particularly important to assess the cost per family benefited since this will determine the cost of implementing the program countrywide.

### *Land registration*

Much work remains to be done to improve the legal framework that shapes land registration practice. Meaningful progress will likely require leadership from the highest levels of Government to coordinate and direct the efforts of BPN and the Ministry of Finance. While there is probably much that BPN could do to streamline the registration process, some obstacles appear to stem from matters beyond BPN's control, including fiscal policies that tax the initial registration of land, as well as national budget policies that fail to appropriate sufficient funds for systematic aerial mapping of parcels.

BPN officials have the skills to prepare the necessary laws and regulations to redesign the existing inefficient land registration system, but they lack direction and adequate funding to accomplish this task. Many of the obstacles to improved land registration are within the power of the Government to solve and could likely be solved in ways that positively impact Government revenues in the long run.

Additional technical assistance to BPN, and coordinated technical assistance to the Ministry of Finance and the People's Representative Council (DPR), will be most effective once the Government assigns a high priority to repairing the land registration program, which, it will be recalled, is to be the recipient of over three-quarters of the funding under the new World Bank-supported Land Management and Policy Development Project.

### *Eminent domain*

The Government should support the draft law "On Land Acquisition for Development Activities for Public Purposes," which is the alternative draft being developed by civil society groups and BPN officials. This draft correctly focuses on limiting the eminent domain power to public purposes and would make the process for acquiring private land more transparent and participatory. The procedural features of the draft require much more development. These drafters would benefit from additional technical assistance. In October 2004 these parties requested additional support and assistance.

### *Law on land rights*

Once it is adopted, the Law on Land Rights will have far-reaching impact on the rights of Indonesian citizens. Although it would be useful to have such a law to define better the rights and obligations of both citizens and the Government with regard to private land rights, it would be better to have no law on land rights than to have the type of draft law BPN submitted to the Government in July. Preparation of a progressive, forward looking law will require leadership from the Government, and a commitment to delving into the procedures and processes that currently threaten citizens with loss of their land rights. It will be important for civil society groups and academics to remain engaged in the process.

Preparation of this law would benefit from technical assistance, including training other branches of the Government, civil society groups and academics regarding the importance of land rights and ways in which a land rights law could be designed to



strengthen the sense of private land ownership and reduce current barriers to claiming secure ownership rights.

### *Revisions to Basic Agrarian Law*

Discussion regarding the future of the Basic Agrarian Law represents a good forum for assessing the commitment of the Government to adopting land use policies that are friendlier to farmers, *adat* law communities who reside in forests, and ordinary citizens. The symbolic importance of the law should not be underestimated. However, the practical importance of the law should also not be overestimated. The Basic Agrarian Law does not contain clear standards for protecting land rights of citizens, and introduction of such protections would likely require a thorough overhaul of the law.

Although the Basic Agrarian Law could be amended to introduce clear protections of private land rights of individuals and traditional communities (and clear restrictions on State powers to interfere with such rights), such protections might not be acceptable to all social groups. Although such protections and limitations would likely be accepted by the overwhelming majority of farmers and other citizens, some civil society groups are suspicious of private land rights and resist the idea that land should be, as it is sometimes put with derogatory connotations, a “commodity” that can be purchased and sold in the market. Such suspicions, which are occasionally expressed in the rhetoric of anti-capitalism or anti-globalism, appear to motivate an influential portion of civil society groups focused on these issues.

It is not easy to see how the current stalemate over the Basic Agrarian Law will be resolved. Civil society groups determined to preserve the populist sentiments expressed in the law will likely resist any attempt to change the law other than to restore the law’s authority over forest and mining areas. The Ministry of Forestry and the Ministry of Energy and Mineral Resources will not relinquish authority over such lands to any other ministry. Unless this stalemate can be resolved, it is unlikely that the law will increase protection to land owners or clarify land owner rights.

While it will be important to monitor development of this issue, it is not clear that technical assistance will be very useful since the questions raised are essentially political and the parties involved are not likely to modify their views soon.

### *Hak ulayat*

The customary communal land rights (*hak ulayat*) of *adat* communities are essentially unprotected by Indonesian law. Most such groups continue to live in areas subject to the jurisdiction of the Ministry of Forestry. Kabupatens have the authority, but not the obligation, either to recognize the existence of such communities or their rights to land. There presently exists no process by which such groups can incorporate and demand that the Government and third parties negotiate with the group for use of lands traditionally claimed by the group. There exists no process for resolving competing claims by *adat* communities that claim the same land. There exists no process for documenting or registering the land claims of such communities.

The current legislation, such as it exists, is wholly insufficient to define and protect communities asserting hak *ulayat*. While it may be premature to offer technical assistance to Government policymakers on this topic, it would be useful to provide technical assistance to civil society groups that are active in working with such communities. Such assistance would focus on examining processes which other societies have designed to address communal land claims of indigenous communities. With such training, the civil society groups will be better prepared to present real solutions to Government policymakers.